

NORTH DELTA WATER AGENCY

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SENT VIA EMAIL: deltaplanNOP@deltacouncil.ca.gov

Delta Stewardship Council
Attn: CEQA for Amending Delta Plan
980-9th Street, Suite 1500
Sacramento, CA 95814

SUBJECT: Comments on NOP for 2017 Delta Plan Amendments

The North Delta Water Agency (NDWA/Agency) is comprised of approximately 300,000 acres in the legal Delta and was formed by a special act of the Legislature in 1973 to take all reasonable and lawful actions to execute and enforce one or more agreements with the United States, State of California, or other entities to: a) protect the water supply of the lands within the Agency against intrusion of ocean salinity; and b) assure the lands within the Agency of a dependable supply of water of suitable quality sufficient to meet present and future needs.¹ NDWA therefore offers these comments as a trustee agency under CEQA on the scope and content of the Draft Program Environmental Impact Report (EIR) for proposed amendments to the Delta Plan.

The overall theme of these scoping comments is the importance of the Delta Plan Amendments being consistent with existing statutes and legally binding agreements, and analyzing impacts in accordance with compliance with those laws and contracts.

Theses comment also raise significant issues related to adequacy of the description of the Proposed Project, a.k.a. proposed Delta Plan Amendments, for purposes of providing comments related to NDWA's trustee status. For instance, the Amendment language for Water Conveyance, System Storage, and the Operations is not consistent with the Delta Plan because it is only a "Discussion Draft" and has not yet been approved by the Council or numbered as regulatory Policies and guidance Recommendations, so it is difficult for NDWA to comment as a

¹ North Delta Water Agency Act, Chapter 283, Special Statutes of 1973.

trustee agency on the adequacy of the scope and content of the Proposed Project or assess potential impacts of the Proposed Project related to the Agency's governing statutory authority or statutory and contractual rights.

The proposed Delta Plan amendments for Conveyance, Storage and Operations are preliminary in nature because they are not yet fully developed and have not even been formatted or approved by the Delta Stewardship Council (DSC/Council) as regulatory Policies or guidance Recommendations. Therefore it is difficult to know what criteria a project applicant would use to determine a conveyance projects is consistent with the Delta Plan in accordance with the DSC Covered Action Process. The failure to provide a complete description of the enforceable Policies prevents NDWA, its water users, and the general public from fully understanding the true scope, severity, and duration of potential environmental and economic effects associated with the construction, permitting, operation, and mitigation of conveyance projects that would be consistent with Delta Plan.

In addition, the Proposed Project should not cause or allow violation of any existing laws or legally binding agreements related to water supply availability and quality. For instance, the Conveyance Amendments should describe relationship to other laws such as SGMA or 1959 and 1992 Delta Protection Acts, or to any existing legally enforceable agreements such as the water supply and quality contract between NDWA and DWR.

I. CONVEYANCE, STORAGE AND OPERATIONS AMENDMENTS

1981 Contract

In 1981, DWR and NDWA executed a Contract for the Assurance of a Dependable Water Supply of Suitable Quality (Contract). The crux of the 1981 Contract, which remains in full force and effect, is a guarantee by the State of California that, on an ongoing basis, DWR will ensure through the operation of the SWP that suitable water will be available to satisfy all agricultural and other reasonable and beneficial uses in all channels within NDWA's boundaries.²

On the eve of the parties signing the 1981 Contract, DWR told the North Delta landowners that the benefits of becoming a SWP water contractor would be receiving "more water, or water of better quality, than they did before the construction of the Central Valley Project and State Water

² *Contract Between State of California Department of Water Resources and North Delta Water Agency for the Assurance of a Dependable Water Supply of Suitable Quality* (1981 Contract), including amendments and the MOU dated May 26, 1998. This MOU provides that DWR is responsible for any obligation imposed on NDWA to provide water to meet Bay-Delta flow objectives, so long as the 1981 Contract remains in effect. In Decision 1641, the State Water Board made the following findings and determinations: "Based on the agreement, the SWRCB finds that the DWR will provide the backstop for any water assigned to the parties within the NDWA as specified in the MOU." (Decision 1641 at 66). The latter findings and determinations were upheld by the trial and appellate courts that subsequently reviewed Decision 1641.

Project.”³ Since the SWP and CVP water supply operations commenced, however, the reduction of naturally occurring high flushing flows from upstream storage combined with the pull of the State and federal export pumps have contributed to the intrusion of salinity into the Delta.⁴

Now, the SWP and CVP water conveyance project operations have effectively transformed the natural Delta freshwater “reservoir” into more of a flowing stream, resulting in relatively minor decreases in outflow that can have a serious impact on Delta water quality. These changed conditions are the basis for DWR executing a water supply availability and quality contract with the NDWA.

The Contract contains provisions requiring DWR to operate the SWP to among other things: a) furnish water supply of specified water quality criteria year-round; b) to avoid creating reverse and unnatural flows; c) to avoid altering surface water elevations in a manner that is detrimental to Delta channels or water users; and d) release reservoir storage or cease all exports and reservoir storage if water quality falls below Contract salinity criteria.

Changes in Delta hydrology can influence water quality across a broad range of constituents. Currently, all of the waterways of the Bay Delta are water-quality impaired for one or more contaminants;⁵ therefore, any changes that worsen the existing conditions also exponentially increases the level of significance of each impact associated with construction and operation of new conveyance or storage facilities. Impacts due to construction and operation of new conveyance or storage facilities of particular concern to NDWA are sea water intrusion as a result of sea level rise or decreased Delta outflow can increase the concentration of salts (i.e. bromides, chlorides, etc.).

A reduction in surface water elevations would adversely affect water supply availability within NDWA in ways that are not addressed in the Proposed Project (Delta Plan Amendments). For example, the impact to agricultural water diverters that utilize gravity siphons and other irrigation systems designed to optimize water diversion and conveyance based on the *current* flow and water level regime would be impacted unless there is a Delta Plan amendment establishing surface water criteria that must be met by construction and operation of conveyance and storage projects. The gravity siphons and pumps that are used to divert surface water in NDWA simply will not work effectively if water surface elevations are significantly reduced by operation of conveyance or storage projects altering flows. If siphons are rendered inoperable it would become necessary for Delta diverters to install mechanical pumps powered either by electricity (which is often infeasible) or internal combustion engines. If the latter are used, this

³ DWR Director Ronald Robie quoted in the Sacramento Bee, “Water Payment Progress Helped By Fear Of Canal.” (March 21, 1980).

⁴ Hanak et.al, Managing California’s Water: From Conflict to Reconciliation (Public Policy Institute of California 2011). (“Delta farmers complained of increasing salinity in their water supplies as upstream diversions and combined CVP/SWP operations depleted more of the natural flow.”)

⁵ United States Environmental Protection Agency, Staff Report: Analysis of Water Quality Issues in EPA’s February 2011 ANPR (2011). Available at <http://www2.epa.gov/sites/production/files/documents/actionplan-appx1.pdf> .

would cause air quality and other impacts that would be detrimental to the health and prosperity of residents in the Plan Area.

In addition, when export levels are low, the Sacramento River's flow is dominantly tidal with both positive (flow to the north) and negative (flow to the south) oscillations of similar magnitudes with the tides, averaging to a net flow of approximately zero. As current exports increase in mid- to late-June, the oscillations shift such that the net flow becomes negative and the number of hours each day when the flow moves to the north is reduced. From mid-July through August, when total exports at South Delta continuously exceed 10,000 cfs, the flow becomes primarily to the south, effectively eliminating the natural ebb tidal flow that would occur otherwise. This creates an unnatural flow pattern in which water no longer oscillates between north and south, but simply flows constantly south in a reverse flow.

Due to the Delta's high reliance on groundwater for agricultural and domestic water supplies, the lowering of groundwater elevations during construction dewatering would also create significant adverse impacts on those beneficial uses, including a loss of sub-irrigation. A reduction in sub-irrigation would, in turn, require increased surface water diversions by agricultural water users. The EIR should analyze these impacts, because it does not weigh the substantial increased capital and operation and maintenance costs associated with conversion to mechanical pumps. NDWA is particularly concerned with potential reductions in water surface water elevations within the North Delta that could constitute a breach of DWR's obligations under Article 6 of the 1981 Contract.⁶ Violations of the 1981 Contract would give rise to damage claims against the State by water diverters within NDWA.⁷

To protect in-Delta landowners and Delta as an evolving place the Delta Plan should include assurances in the conveyance Amendments that:

- Projects are prohibited from using eminent domain proceedings to acquire water rights of water users within the Proposed Project Planning Area as shown in Figure 1 of the NOP.
- Require conveyance projects, including gates and barriers, to prepare an EIR and explicitly prohibit use of programmatic or negative declarations.

The Amendments should establish clear and quantifiable criteria in terms of minimum standards that should be maintained for water quality and water supply diversion methodologies for surface and groundwater supplies and the EIR analysis should ensure the impacts to the water elevations are fully evaluated and mitigated in regards to:

- More than 2,500 water diversions, including gravity siphon diversions for agricultural uses, in the Plan area⁸ could be prevented from accessing water supplies if surface elevations are lowered by conveyance or storage operations.

⁶ NDWA 1981 Contract, Art. 6 ("The state shall not... cause the water surface elevations in Delta channels to be altered to the detriment of Delta channels or water users within the Agency...").

⁷ *Id.* ("...the State shall repair or alleviate the damage... and shall be responsible for all diversion facility modifications required.")

⁸ Number of diversions as disclosed in BDCP Plan Chapter 5 Effects Analysis.

- Groundwater is used throughout the Delta for agricultural, residential, and industrial beneficial uses, including for irrigation of orchards in the North Delta. In the upland peripheral Delta areas, average annual groundwater pumping is estimated to range between 100,000 and 150,000 acre-feet, both for domestic and agricultural uses and could be affected (positively or negatively) by conveyance and storage projects.

The EIR should describe the context in which local water supplies are accessed and used, and properly disclose the level of significant impacts imposed on agricultural and municipal water users in the Plan Area. Impacts analysis and disclosure in the EIR/EIS needs to provide details on specific locations, durations, timing, size, and intensity. Included in the mitigation measures if “just compensation” to water users for “taking” of water rights if water supplies are so impaired as to no longer meet beneficial uses as a result of the new conveyance facilities.

Consistency with Covered Action Process and Protect Council’s Appellate Role

The 2013 Delta Plan contains 14 Policies approved as enforceable regulations by the Office of Administrative Law and 73 Recommendations that provide non-regulatory guidance and objectives. The 56-page *Chapter 3 A More Reliable Water Supply for California* has two regulatory Policies and 19 guidance Recommendations. The Certification of Consistency that is required under the Covered Action Process must include detailed findings in regards to the project being in compliance with Delta Plan Policies.

DSC is designated as an appellate body in the Covered Action Process. Therefore, the Delta Plan Amendments should avoid creating any legal conflicts for them in performing those duties. The Conveyance Amendments should remain neutral on design components and instead describe the objectives that any conveyance project applicant should achieve so that any type of conveyance project could be objectively evaluated by the Council in terms of Delta Plan compliance if an appeal is filed on a Consistency Certification.

Currently, the Conveyance, Storage and Operations amendment language is drafted in narrative form without any numbered Policies or Recommendations, and there is no indication regarding which language will be deleted in Chapter 3. Therefore, the Proposed Project fails to provide the regulatory measures that a covered action must certify consistency with.

The deficiency of the Conveyance amendments is apparent when compared to the amendments to *Chapter 7 Reduce Risk to People, Property, and State Interests in the Delta* which has: a) strikeout of deleted narrative, Policies, and Recommendations; b) underline for new wording being added; and c) formatted with numbered Policies and Recommendations.

In order to facilitate compliance with the Covered Action Process, the DSC should define what types of conveyance or storage projects that Delta Plan Policies and Recommendations would apply. However, to avoid creating conflicts with the Council’s appellate role in any Delta Plan Consistency Certification the Amendments should avoid describing design components of what covered action projects should look like because including design components results in: 1) pre-

determination of type of conveyance projects; or 2) prevents any projects deviating from the design description from being able to be “consistent” with the Delta Plan conveyance policies.

The Proposed Project is unclear what types of projects would even be required to comply with the Conveyance Amendments. Is the intent that the Amendments only apply to SWP or CVP conveyance facilities, or would it also apply to any intakes or other facilities proposed by other entities such as Contra Costa Water District, City of Stockton, Sacramento County, etc? Is the intent that the Amendments only apply to conveyance projects located in the North Delta, or would also apply to new intakes or other facilities proposed to be constructed anywhere in the Delta? Is the intent that the Amendments only apply to conveyance facilities that have multiple intakes, would the Amendment also apply to single diversion intakes such as Freeport Intake? Is there a cfs threshold to indicate which conveyance facilities would have to comply with the Amendments (ie: over 250 cfs)?

The content of the Conveyance Amendments should be written in a way that clearly defines the types of criteria that projects would need to include in order to be consistent with Delta Plan (ie; meet specific inflows and outflows, reduce reverse flows, comply with existing legally enforceable agreements with in-Delta water agencies on Delta water supply, require fish screens on diversion intakes, prohibit reduction in water surface levels that are detrimental to in-Delta water users, etc), but should remain neutral on types of conveyance projects by not prescribing design components in the Amendments. In other words, to preserve the Council’s role as an appellate body on Delta Plan consistency, the Conveyance Amendments should be neutral and unbiased when it comes to the project design or location.

The Delta Plan should require any new conveyance or storage projects to provide a robust analysis of the changes in tidal excursions in the Plan Area and identification of impacts in its project EIR/EIS to provide details on quantitative changes (better or worse) in water quality, surface water elevations (water supply), and covered fish species. This analysis should include specific details on the timing, locations, duration, and intensity of the alteration of natural tides in the Plan Area and appropriate mitigations to reduce any adverse impacts on beneficial uses.

Consistency with Existing Water Rights and Delta Protection Statutes

The 2009 Delta Reform Act (DRA) contains many statutes providing Legislative direction on what should be considered when Delta conveyance facilities are proposed, but there are also many other existing water rights, State water project objectives, and Delta protection laws that should be incorporated into the Delta Plan criteria.

For example, Amendments should include criteria that any conveyance facilities proposed as part of SWP or CVP are required to include recreational components as required in Water Codes governing construction of those facilities such as Division 6 on Development of Water Resources which includes a requirement that planning and construction of State Water Projects allow for full utilization for recreational purposes (W.C. Sections 11900-11925).

Another example is including criteria in the Delta Plan Amendments that in accordance with Water Code Sections 12220-12205 the conveyance project must include an alternative water supply to in-Delta water users if cannot meeting Delta water quality objectives and prohibit export of any water that is not surplus to which users in the Delta are entitled under existing water rights laws. This would also be consistent with DRA requirements to not “diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections (PRC §85031).

In addition, the numerous provisions in the DRA with direction regarding conveyance facilities have not been fully incorporated as criteria in the Delta Plan Conveyance Amendments, but should be. Examples of DRA statutes that should appear as enforceable Delta Plan criteria that projects would be evaluated as a covered action include requirement for flow criteria to comply with PRC §85085 or PRC §85088 prohibiting initiation of construction for new Delta conveyance facilities until SWRCB has approved a change in point of diversion permit and until water export contractors have signed financial agreements for payment of design, construction, mitigation and reimbursement of local taxes. Another example is selecting measures from PRC §85320 that may still be appropriate to incorporate even if conveyance projects do not include HCP/NCCP, such as requiring project to provide a comprehensive review and analysis of a reasonable range of flow criteria, effects of project related to climate change, flood management, and water quality per PRC §85089.

Evaluation of Storage Impacts

The recent drought years have shown the problems created if operation of reservoirs results in insufficient carryover storage to provide adequate Delta water quality or cold water for fish. Therefore, the types of issues that should be addressed in the Delta Plan Amendments on Storage are: 1) prevent a decrease in carryover storage at the end of September for Lake Oroville, Trinity Lake, Shasta Lake, and Folsom Lake in all years; and 2) prohibit use of TUCPs as an operational solution if changes in storage reduce the ability of the CVP and SWP to meet system water demands and environmental water needs.

As mentioned earlier, existing laws provide protection of senior water rights, including providing alternative water supply to water users in the Delta if necessary and should be minimum requirements in storage and conveyance Amendment criteria.

PERFORMANCE MEASURES

Project and EIR Timeline

The Delta Plan has a very long vision of planning for one hundred years of change. The Performance Measures in the Delta Plan should be drafted to define the amount of change that it will allow to occur in 10-year increments. This decadal timeline should establish maximum thresholds in terms of things like how many acres will be converted from agriculture to habitat, how many acres of agriculture will be replaced by water conveyance infrastructure facilities, the

range of Delta water flows expected under various water conveyance schemes (-15,000 cfs out of North Delta), or the amount of levee improvement investments expected over time.

In order for this EIR to properly discuss the Proposed Project's incremental effects and determine when they are cumulatively considerable (CEQA Guidelines section 15130(a)(1) for purposes of mitigating them to a level of insignificance, this EIR must break down the long planning horizon of the Proposed Project into manageable timelines that allow "foreseeable and probable" impacts to be identified, quantified, and mitigated. This breakdown into manageable timelines will also allow the Delta Plan to adapt in its five year updates as individual projects become reality over time. Specifically, the EIR should outline the long planning horizon of the Proposed Project into discrete and manageable chunks of time as follows:

"Near Term" (1-10 years)

"Mid Term" (11-20 years)

"Long Term" (21-50 years)

The EIR should also provide benchmarks in terms of the specific amount and intended locations for the physical changes it expects will occur in each time period, quantify the anticipated impacts for each time period, and the proposed mitigation for each time period. This seems like an appropriate way for a Programmatic EIR to provide sufficiently detailed information to the public on the expected impacts if conveyance and storage projects complied with criteria to be evaluated in Covered Action Process.

CONCLUSION

The incomplete nature of Delta Plan Amendments for Conveyance and Performance Measures prevents NDWA from fully comprehending the full extent of the scope, duration, intensity, or severity of impacts in the Plan Area that may be associated with the Proposed Project. In addition, it seems inappropriate to request public comments on a Notice of Preparation before the Council has formally approved final language for Delta Plan Amendments for Conveyance and Performance Measures.

The NDWA encourages the Council to ensure that Delta Plan Amendments respect the 1981 Contract, remain unbiased in terms of the design and location of conveyance facilities, and protect the integrity of the Council's neutrality when serving as an appellate body in the Covered Action Process.

Sincerely,



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